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Supreme Court, U.S.
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No. 95-303

In The

Supreme Court of the United States

October Term, 1995

ROSS YORDY CONSTRUCTION COMPANY, INC., an Illinois corporation and ROSS YORDY,

Petitioners,

v.

SAMUEL NAYLOR, VI, in his individual capacity,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly found that Plaintiffs failed to state a cause of action for a violation of a constitutional right and that Plaintiffs failed to allege a state created status or right.

2. Whether the court of appeals properly held that Plaintiffs could not combine a defamation claim with a deprivation caused by an absolutely immune act in order to state a cause of action.

3. Whether Plaintiffs are unable to claim a denial of their due process rights because they cannot allege nor prove inadequate state remedies.

4. Whether qualified immunity bars Plaintiffs' claims against Naylor because he violated no clearly established constitutional right.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
REASONS FOR DENYING CERTIORARI:	
I. The Court of Appeals Properly Found That Plaintiffs Failed To State A Cause Of Action For A Violation Of A Constitutional Right And That Plaintiffs Failed To Allege A State Created Status Or Right	5
II. The Court of Appeals Properly Held That Plaintiffs Could Not Combine A Defamation Claim With A Deprivation Caused By An Absolutely Immune Act In Order To State A Cause Of Action	12
III. Plaintiffs Are Unable to Claim A Denial Of Their Due Process Rights Because They Cannot Allege Nor Prove Inadequate State Remedies	14

TABLE OF CONTENTS - Continued

		Page
IV.	Qualified Immunity Bars Plaintiffs' Claims Against Naylor Because He Violated No Clearly Established Constitutional Right.	17
CONCLUSION.		21
APPENDIX - STATUTES INVOLVED.		1a

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) . .	5
Albright v. Oliver, ____ U.S. ____, 114 S.Ct. 807 (1994).	15
Anderson v. Creighton, 483 U.S. 635 (1987)	17, 18
Barts v. Joyner, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989)	14
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).	5, 6, 9
Botefur v. City of Eagle Point, Or., 7 F.3d 152 (9th Cir. 1993).	10
Buckley v. Fitzsimmons, ____ U.S. ____, 113 S.Ct. 2606 (1993).	*passim*
Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 740 (1995) .	*passim*
Burns v. Reed, 500 U.S. 478 (1991)	12
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). .	15

TABLE OF AUTHORITIES - Continued

	Page
Colaizzi v. Walker, 812 F.2d 304 (7th Cir. 1987)	7
Collins v. City of Harker Heights, Texas, 503 U.S. 115 (1992)	15
Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978)	14
Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)	2, 15
Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989)	19
Hand v. Gary, 838 F.2d 1420 (5th Cir. 1988)	14
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	17
Imbler v. Pachtman, 424 U.S. 409 (1976)	12
Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988)	14
Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989)	7
Mahoney v. Kesery, 976 F.2d 1054 (7th Cir. 1992)	10

TABLE OF AUTHORITIES - Continued

Page

Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981) . . 19

Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) 3, 16

Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988). . . 18, 19

Parratt v. Taylor, 451 U.S. 527 (1981) . . . . . *passim*

Paul v. Davis, 424 U.S. 693 (1976) . . . . . *passim*

People v. Nasser, 223 Ill. App. 3d 400, 584 N.E.2d 1010 (4th Dist. 1991), *aff'd*, 153 Ill.2d 195, 606 N.E. 2d 1167 (1992). 9

People v. Strebin, 209 Ill. App. 3d 1078, 568 N.E.2d 420 (4th Dist. 1991) 9

Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989) 20

Powers v. Coe, 728 F.2d 97 (2d Cir. 1984). 14, 16, 20

Schiavone Const. Co. v. Merola, 678 F. Supp. 64 (S.D.N.Y.), *aff'd*, 848 F.2d 43, *cert. denied*, 488 U.S. 855 (1988). 16

TABLE OF AUTHORITIES - Continued

Page

Sherwin Manor Nursing Center, Inc. v. McAuliffe, 37 F.3d 1216 (7th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3068 (June 29, 1995) 5-6

Siegert v. Gilley, 500 U.S. 226 (1991) . . . . . *passim*

Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982) 14

Smith v. Gonzales, 670 F.2d 522 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982) 14

Souza v. Pina, 53 F.3d 423 (1st Cir. 1995) 19

Vukadinovich v. Bd. of School Trustees of Michigan City Area Schools, 978 F.2d 403 (7th Cir. 1992), *cert. denied*, ____ U.S. ___, 114 S.Ct. 133 (1993) . . . 10

Zinermon v. Burch, 494 U.S. 113 (1990) 10, 15

Statutes

42 U.S.C. Section 1983 . . . . . *passim*

725 ILCS 120/4 (1992) 7, 8

730 ILCS 5/5-3-2(a)(3) (1992) 9

TABLE OF AUTHORITIES - Continued

Page

730 ILCS 5/5-5-6 (1992) 8, 10, 11, 12, 18, 19

735 ILCS 5/2-1001.5 (1992). 16

735 ILCS 5/2-1105.1 (1992). 16

735 ILCS 5/2-1106 (1992) 16

Rules

Ill. Rules of Professional Conduct, Rule 3.6 (1991) 15

Ill. S.Ct. Rule 234 (1992). 16

SUMMARY OF ARGUMENT

The court of appeals correctly held that Plaintiffs failed to establish a cognizable claim under 42 U.S.C. Section 1983 for alleged violations of Plaintiffs' constitutional rights. Plaintiffs assert that besides being defamed, they were denied a state created right to a status as "victims" of a criminal offense. Mere defamation is not actionable under the Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 706 (1976). However, stigmatizing injury to reputation is actionable when it is connected with an injury to a more tangible interest. *Id.* at 701. The nature and scope of such protected interests is narrow. *See Siegert v. Gilley*, 500 U.S. 226 (1991). Plaintiffs attempt to base their tangible benefit or status upon their alleged status as "victims" of a charged criminal offense, as well as a possible right to restitution. Both the right to restitution and the status of "victim" are contingent upon actions which may or may not have occurred if the criminal prosecution had proceeded. Accordingly, Plaintiffs had no more than a unilateral expectation to these alleged rights and have failed to state a due process claim.

Even if Plaintiffs could claim some right or status, there is an insufficient nexus between the alleged defamation and the constitutional deprivation claimed. *See Siegert*, 500 U.S. 226. Any damages which Plaintiffs could or would have suffered are contingent upon obtaining a conviction in the underlying criminal matter. That connection was cut off by the dismissal of the prosecution, not any defamatory statements. Any opportunities Plaintiffs may have to press later civil charges against the criminal defendant were not impacted by the defamation.

Further, prosecutors are absolutely immune for their decisions to dismiss criminal charges. While statements to the press are not entitled to absolute immunity, *Buckley v. Fitzsimmons*, ____ U.S. ____, 113 S.Ct. 2606, 2617 (1993), Plaintiffs alleged deprivation of rights was not caused by the defamation but was actually caused by the dismissal of the criminal prosecution. The court of appeals properly held that Plaintiffs cannot rely on an immune act to support otherwise non-actionable defamation claims. This separation of immune from non-immune acts has a long standing history in the various federal circuits in the context of police officers. The federal circuits are in agreement that a police officer who engages in investigative misconduct can not normally be held liable for the consequences of an indictment and prosecution because those decisions are made by others who enjoy absolute immunity for those decisions. (See cases cited, *infra*, pp. 13-14). Therefore, the appellate court correctly held that Plaintiffs' claims arising from statements to the press failed to set forth any cause of action against the Defendant, Naylor, apart from those which are clearly barred under the doctrine of absolute immunity.

Plaintiffs' due process claim also must fail because they have not challenged the adequacy of Illinois post-deprivation remedies. *Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981). Naylor's status as a policy maker does not mean that his actions were not "random and unauthorized." *Easter House v. Felder*, 910 F.2d 1387, 1400-01 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991). Naylor's alleged comments on Plaintiffs' credibility would have exceeded the Illinois restrictions on extra-judicial public comments. Accordingly, Naylor's statements would constitute a "random

and unauthorized" act under *Parratt*. Illinois law clearly provides adequate remedies to redress the alleged harm caused by Naylor. Further, Plaintiffs' failure to proceed in state court forestalls any ability to determine if an impartial jury could have been impaneled in the later civil trial. *See Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976).

Finally, Naylor is entitled to qualified immunity for his statements to the press. Naylor could not have known that in making the alleged defamatory remarks, he would deprive Plaintiffs' of a clearly established liberty or property interest. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 U.S. 740 (1995). Plaintiffs' alleged rights as victims of a criminal offense were not altered by Naylor's statements but only by the dismissal of the prosecution for which he was absolutely immune. Neither Plaintiffs nor Defendant have found any analogous cases sufficient to show that Plaintiffs' rights were clearly established. Plaintiffs have not cited any cases where a defamation claim combined with a possible or contingent status was found sufficient to state a constitutional deprivation. Moreover, Plaintiffs cannot show that a reasonable official should have known that the available state remedies were inadequate. Accordingly, Naylor is entitled to qualified immunity.

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I.

THE COURT OF APPEALS PROPERLY FOUND THAT PLAINTIFFS FAILED TO STATE A CAUSE OF ACTION FOR A VIOLATION OF A CONSTITUTIONAL RIGHT AND THAT PLAINTIFFS FAILED TO ALLEGE A STATE CREATED STATUS OR RIGHT.

To establish a cognizable claim under 42 U.S.C. Section 1983, Plaintiffs Ross Yordy Construction Company, Inc. and Ross Yordy (hereinafter "Plaintiffs") are required to show that Defendant Samuel Naylor, VI (hereinafter "Naylor") deprived them of a right secured by the Constitution of the United States and that the deprivation was achieved under color of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Plaintiffs have claimed that their rights arose under the Fourteenth Amendment. To determine whether Plaintiffs have stated a due process claim, the court must look to the nature of the interest at stake and determine if it is within the scope of the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972).

The range of interests protected by the Fourteenth Amendment "are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Accordingly, the Fourteenth Amendment is implicated whenever a government actor seeks to remove or significantly alter cognizable benefits, rights, or status without affording the deprived individual due process. *Paul v. Davis*, 424 U.S. 693, 711 (1976). *See also Sherwin*

Manor Nursing Center, Inc. v. McAuliffe, 37 F.3d 1216, 1220 (7th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3068 (June 29, 1995) (due process claims require "a property deprivation of constitutional magnitude").

Under *Roth*, in order to seek the protection of a "property" right under the Due Process Clause, Plaintiffs are required to show that the right deprived was one which Plaintiffs must "clearly have more than an abstract need or desire for . . . [They] must have more than a unilateral expectation of it. [They] must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. However, Plaintiffs argue that *Roth* holds that a person who cannot claim a "property" right (employment in *Roth*), may still claim a "liberty" right, if that right is terminated in connection with a public actor's imposition of a "stigma" on the individual. *Roth*, 408 U.S. at 573.

Plaintiffs rely on the *Roth* liberty right "stigma-plus" analysis, more fully developed in *Paul v. Davis* because this Court has consistently rejected the proposition that reputation alone is either "liberty" or "property" protected by the Constitution. *See Paul*, 424 U.S. at 701-07. "[T]he mere defamation of an individual ... [is not] sufficient to invoke the guarantees of procedural due process. . . ." *Id.* at 706. However, *Paul* held that stigmatizing injury to reputation is actionable when it is connected with an injury to a more tangible interest, such as loss of employment. *Id.* at 701.

This Court has suggested how narrow the nature and scope of such protected liberty interests are when it rejected a stigma-plus claim because plaintiff voluntarily resigned his employment three weeks prior to the defamatory publication being made. *Siegert v. Gilley*, 500 U.S. 226 (1991). Even though the defamatory comments had the effect of limiting

plaintiff's future employment prospects, *Siegert* held that the plaintiff failed to establish a violation of a constitutional right because the alleged defamation was not "uttered incident to the termination of Siegert's employment . . . ." *Id.* at 234. This Court has also held that a "state creates a protective liberty interest by placing substantive limitations on official discretion." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). To have a protected interest whether it be property or liberty, the Due Process Clause requires that the law, regulation or standard contain "explicitly mandatory language." *Id.* at 463.[1]

The tangible benefit or "status" Plaintiffs base their Fourteenth Amendment claim upon is founded in Illinois law which Plaintiffs believe confers upon them specific legal rights as "victims" of a *charged* criminal offense. Plaintiffs allege that the State of Illinois has conferred a legally cognizable status on "victims" of crime, according them various rights. As examples, Plaintiffs specifically enumerate two "victims rights:" (1) the right "to be notified by the office of the State's Attorney before the office of the State's Attorney makes any offer of a plea bargain to the defendant or enters into negotiations with the defendant concerning a possible plea bargain;" 725 ILCS 120/4(6) (1992) and (2) the right "to be notified . . . of the ultimate disposition of the cases arising from an indictment or an information . . . . " 725 ILCS 120/4(7) (1992). First, Plaintiffs have made no allegation that Naylor made an offer of a plea bargain or entered into any negotiations with former employee Rose Pepple concerning a plea bargain; thus, this

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[1] Plaintiffs argue that liberty cases of this type regarding prison settings are inapplicable. However, the only cases which Plaintiffs cite showing a lesser standard are employment cases which are clearly distinguishable due to the liberty interest granted in occupation. *See, e.g., Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987).

"right" is not implicated. Second, while a victim may be accorded by law the "right" of notification concerning the ultimate disposition of a case, the statute does not provide for when or how such notification must occur. Moreover, the "victims rights" statute at the time of Plaintiffs' alleged harm required that victims had to make a "specific request" of the State's Attorney, prior to the State's Attorney being required to provide information to a victim. 725 ILCS 120/4. Plaintiffs fail to make any allegation that they made a specific request of the State's Attorney which was subsequently denied, and for this reason alone they are deprived the "status" they seek.

Perhaps in recognition of the fact that "victim" status under 725 ILCS 120/4 and any possible harm is nebulous and hard to ascertain, Plaintiffs seek protection under a victim's restitution statute. The statute states in pertinent part that:

> . . . the court shall at the sentence hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate, the offender may be sentenced to make restitution which shall be determined by the Court.

730 ILCS 5/5-5-6 (1992).

Plaintiffs claim this statute confers upon them the status of "victims of charged criminal offenses" who have a legal right to restitution. However, certain key elements of this Illinois

statute were deemed significantly lacking by the lower courts in Plaintiffs' case.

First, the statute under Illinois law does not apply to "victims of *charged* criminal offenses." Any claimed right Plaintiffs may have under this statute vests, if at all, *only* upon criminal conviction. *See People v. Nasser*, 223 Ill. App. 3d 400, 584 N.E.2d 1010, 1016 (4th Dist. 1991), *aff'd*, 153 Ill.2d 195, 606 N.E.2d 1167 (1992) ("a criminal defendant becomes subject to an order of restitution *only after* he has been convicted") (emphasis added). As a result, Plaintiffs cannot claim restitution until a conviction, if any, is rendered. To recognize Plaintiffs' claim of a legally cognizable status at this juncture would presuppose that former employee Rose Pepple would have been convicted of the charges against her.

Second, a victim's right to restitution is not automatic in Illinois. Following conviction, "the trial court should satisfy itself of the legitimacy of any claim for restitution, as well as the amount of the claim." *Nasser*, 584 N.E.2d at 1016, *citing* 730 ILCS 5/5-3-2(a)(3). Restitution is merely a part of the sentence an Illinois criminal defendant could be given. It is clear that restitution to the victim is not mandatory in Illinois; rather, the state court is vested with discretion regarding whether to enter such an order. *People v. Strebin*, 209 Ill. App. 3d 1078, 568 N.E.2d 420, 424 (4th Dist. 1991).

Against this backdrop, it is inarguable that Plaintiffs' claim would fail under *Roth* because Plaintiffs cannot argue more than a unilateral expectation of the right to restitution given the uncertainty of whether a conviction would issue and, if so, whether the trial court would order restitution. Even if victims are granted certain rights under Illinois law, it is not a "right" or "status" Plaintiffs had yet attained. If Plaintiffs' minor alleged deprivation is enough to state a liberty interest or

property right, a deprivation of any kind, no matter how small, would have to be considered a due process violation under Section 1983.

Thus, Plaintiffs have failed to assert a claim for deprivation of some previously held tangible interest -- a governmental right, benefit or entitlement. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) (evaluation of due process claims requires a determination of whether there was a deprivation of a protected interest). Further, this Court should not grant *certiorari* to decide a case which is essentially a question of Illinois law.

Even assuming Plaintiffs could legitimately claim some right or "status" under 730 ILCS 5/5-5-6, there is an insufficient nexus between the alleged defamation and the constitutional deprivation claimed. *See Siegert*, 500 U.S. 226; *Botefur v. City of Eagle Point*, Or., 7 F.3d 152, 157 (9th Cir. 1993) (no Section 1983 cause of action where alleged defamatory statements were made after plaintiff's resignation); *Vukadinovich v. Bd. of School Trustees of Michigan City Area Schools*, 978 F.2d 403 (7th Cir. 1992), *cert. denied*, ____ U.S. ____, 114 S.Ct. 133 (1993) (derogatory comments made by Board members about an employee, *after* they had fired him, were not actionable under the Fourteenth Amendment because the employee at the time faced no threat of lost government employment) (emphasis supplied); *Mahoney v. Kesery*, 976 F.2d 1054 (7th Cir. 1992) (plaintiff must show that the defamation itself brought about the denial of constitutional rights).

Naylor's only action which actually impacted Plaintiffs was his dismissal of the charges against Pepple. This dismissal ruled out the possibility of a criminal conviction -- the statutory prerequisite to a court's consideration of an order of restitution.

See 730 ILCS 5/5-5-6. Naylor's alleged defamatory comments, made after the case was dismissed, had no impact on Plaintiffs' right to restitution. Further, it is uncertain whether Defendant Rose Pepple would have been convicted of the crimes charged.

Moreover, Plaintiffs' claims in regard to their inability to seek civil redress against Pepple are similarly insufficient to state a claim of entitlement under the Fourteenth Amendment because they allege an untested "future" harm resulting only from the lasting vestiges of the alleged defamation. Importantly, *Siegert* specifically rejected a claim based upon a future harm. *Siegert*, 500 U.S. 226, 233. Any loss of future employment, flowing from the defamatory letter, was damage resulting from injury caused to Siegert's reputation, which injury is not compensable. *Id.* at 234 .

Due to Illinois law, Plaintiffs' claims of "future" harm are also subject to rejection because Plaintiffs can present no solid evidence that they had a legal status under 730 ILCS 5/5-5-6 or that their prospects of gaining civil redress from Pepple have been impacted by Naylor's alleged defamation. Moreover, any impact Naylor's comments would have on Plaintiffs' ability to press civil charges against Pepple would flow from a harm to reputation, which is clearly not compensable under Section 1983. As such, Naylor's alleged defamatory remarks cannot be said to have a sufficient nexus with the harm alleged by Plaintiffs so as to state a stigma-plus claim under *Paul v. Davis*, 424 U.S. 693.

Accordingly, *certiorari* should be denied.

II.

THE COURT OF APPEALS PROPERLY HELD THAT PLAINTIFFS COULD NOT COMBINE A DEFAMATION CLAIM WITH A DEPRIVATION CAUSED BY AN ABSOLUTELY IMMUNE ACT IN ORDER TO STATE A CAUSE OF ACTION.

Clearly, Naylor, as a prosecutor, is absolutely immune for his decision to dismiss criminal charges. *Buckley v. Fitzsimmons*, ____ U.S. ____, 113 S.Ct. 2606 (1993); *Burns v. Reed*, 500 U.S. 478, 486 (1991). Plaintiffs have, as a result of Naylor's acts, been deprived the opportunity of proceeding with the filed criminal charges against Pepple. As Plaintiffs have previously conceded, however, the determination of whether or not to prosecute is intimately associated with the judicial function, and prosecutors are accorded absolute immunity from liability for injury based upon these types of decisions. *Imbler v. Pachtman*, 424 U.S. 409, 422 (1976).

On the other hand, Plaintiffs argue that the alleged defamatory comments made by Naylor during the press conference in conjunction with the dismissal of charges against Pepple states a violation of the Fourteenth Amendment. The Seventh Circuit stated on remand in *Buckley* that when "a plaintiff . . . uses a 'stigma-plus' approach to avoid *Paul* and *Siegert*, [he] must identify a 'plus' other than the indictment, trial and related events for which the defendants possess absolute prosecutorial immunity." *Buckley v. Fitzsimmons*, 20 F.3d 789, 798 (7th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 740 (1995). Plaintiffs have identified their loss as a loss of "exalted" status as victims who could gain restitution under 730 ILCS 5/5-5-6. If such a status could be afforded Plaintiffs under Illinois law, it is inarguable that they lost this status because Naylor dismissed charges against Pepple, not because

he allegedly defamed Plaintiffs. *See Buckley*, 20 F.3d at 798. Due to Naylor's absolute immunity, Plaintiffs have not identified a "plus" for which Naylor is potentially liable. *Id.* at 798.

The real dispute, therefore, is whether Plaintiffs can bootstrap their defamation claim onto the dismissal of the criminal charges; or whether, as the court of appeals held, Plaintiffs cannot rely on an immune act in order to give life to otherwise non-actionable defamation claims. Plaintiffs argue that the appellate court's decision in this case effectively "robs" this Court's decision in *Buckley v. Fitzsimmons*, 113 S.Ct. 2606, "of any precedential force" (Petition, p. 20). However, the appellate court effectively accommodated this Court's conclusion in *Buckley* that absolute immunity is unavailable for non-prosecutorial functions, while simultaneously preserving the immunity which still remains available for prosecutorial acts. The plurality opinion in *Buckley* expressly left the door open for such an approach. *Buckley*, 113 S.Ct. at 2615 ("location of the injury may be relevant to whether a complaint has adequately alleged a cause of action for damages"). Justice Scalia suggested in concurrence that this approach was indeed appropriate (*Id.* at 2620), and the dissent "implied agreement." *Buckley*, 20 F.3d at 792, *citing* 113 S.Ct. at 2622 (Kennedy, J., dissenting). Plaintiffs' attempt to state a cause of action reveals a thinly disguised effort to recover against Naylor for his decision not to prosecute Pepple. If Plaintiffs are not seeking to impose liability for immune acts, then their claim should properly be assessed independent of those immune acts, and the appellate court properly resolved the issue on those grounds.

This separation of immune from non-immune acts has a long standing history in the various federal circuits in the context of police officers. For example, police officers who engage in investigative misconduct are generally not held liable for the consequences of an indictment and prosecution because

those decisions are made by prosecutors cloaked with absolute immunity. *See Barts v. Joyner*, 865 F.2d 1187, 1195-96 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989); *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *Dellums v. Powell*, 566 F.2d 167, 192-94 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). *See also Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (only when officer deceives prosecution may officer be held liable for improper prosecution); *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982) (indictment is absolute bar to claim against police officer).

Accordingly, the Seventh Circuit's decision is in harmony with this Court's decision in *Buckley*, 113 S.Ct. 2606 and the decisions of the other federal circuit courts.[2] Therefore, Plaintiffs' claims arising from statements to the press failed to set forth any cause of action against Naylor apart from those which are clearly barred under the doctrine of absolute immunity.

III.

PLAINTIFFS ARE UNABLE TO CLAIM A DENIAL OF THEIR DUE PROCESS RIGHTS BECAUSE THEY CANNOT ALLEGE NOR PROVE INADEQUATE STATE REMEDIES.

Because Plaintiffs have not alleged they were denied notice or a right to a hearing prior to the denial of their due process rights, one must assume that they are alleging a violation of their substantive and not procedural due process

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[2]*See Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984) (plaintiff must show constitutional deprivation *caused* by press statement).

rights.[3] It is clear that a government official's "random and unauthorized" deprivation of a right or interest cannot be challenged under Section 1983 when the state provides an adequate post-deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527, 535-544 (1981); *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Naylor's status as a policy maker or high ranking public official does not mean that his actions cannot be characterized as "random and unauthorized." *Easter House v. Felder*, 910 F.2d 1387, 1400-01 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

No one could predict if or when a State's Attorney would make defamatory statements. In this case, Naylor's alleged comments on Plaintiffs' credibility and polygraph test would have exceeded the restrictions which the State of Illinois has placed on extra-judicial public comments. *Illinois Rules of Professional Conduct*, Rule 3.6 (1991). *See also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 252-53 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (prosecutors may be subject to restrictions on speech). Further, attorneys are subject to the Attorney Registration and Disciplinary Commission and Illinois defamation laws. Naylor's alleged deviation from these standards, therefore, was "random and unauthorized."

Accordingly, the only remaining question is whether

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[3]Supreme Court reluctance to expand the concept of substantive due process has led it to provide the protections it affords to a narrow class of issues, i.e., matters relating to marriage, family, procreation and the right to bodily integrity. *Albright v. Oliver*, ____ U.S. ____, 114 S.Ct. 807, 812 (1994). "[J]udicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what [defendant] did to deprive [her of it]." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

Illinois provides adequate remedies to redress the harm caused by Naylor's alleged violations of these standards. Illinois law provides numerous safeguards, which were adequate either by themselves or in combination, to ensure the integrity of a later state civil trial. Parties have the right to the *voir dire* of a jury as well as peremptory challenges and challenges for cause. Ill. S.Ct. Rule 234 (1992); 735 ILCS 5/2-1105.1 (1992) and 5/2-1106 (1992). If these procedures proved inadequate, Plaintiffs could request a change of venue to a county where Naylor's statements were not disseminated. 735 ILCS 5/2-1001.5 (1992). These remedies have been provided because the law has "foreseen that the minds of all potential jurors may not be clean slates." *See Schiavone Const. Co. v. Merola*, 678 F. Supp. 64, 66 (S.D.N.Y.), *aff'd*, 848 F.2d 43, *cert. denied*, 488 U.S. 855 (1988).

Plaintiffs' failure to proceed in state court forestalls any ability to determine if an impartial jury could have been impaneled. *See Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976). *See also Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984) (plaintiffs must show that other remedies were unavailable or were used to no avail to alleviate the effects of unfavorable press). Plaintiffs are only speculating that they could not have obtained a fair trial. Accordingly, Plaintiffs have failed to state a claim, *Martin*, 532 F.2d at 194, and this Court should not grant Plaintiffs' petition for *certiorari*.

IV.

QUALIFIED IMMUNITY BARS PLAINTIFFS' CLAIMS AGAINST NAYLOR BECAUSE HE VIOLATED NO CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT.

To the extent that Plaintiffs are able to avoid the holding of *Paul v. Davis*, Naylor is entitled to qualified immunity because Naylor could not have known that in making the alleged defamatory remarks he deprived Plaintiffs of a liberty or property interest. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994), *cert. denied*, ____ U.S.____, 115 S.Ct. 740 (1995). As this Court well knows, government officials are immune from liability for performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "A necessary concomitant to the determination of whether the constitutional right asserted by plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Only if such a claim is properly made must the court determine whether the public official's actions could have reasonably been thought consistent with the asserted constitutional right. Such a two-step analysis "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert*, 500 U.S. at 232.

The contours of the right an official is alleged to have violated must be sufficiently clear so that a reasonable official can understand that he is violating that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If this protection was

not afforded government officials, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639. A fact-specific application of qualified immunity provides the only manner in which a public official may avoid a monetary judgment for actions taken during the development of bright line constitutional standards.

At the heart of Plaintiffs' claim is their alleged right as "victims" of a charged criminal offense, which is predicated on Illinois law interpreting 730 ILCS 5/5-5-6. Similar to Plaintiff's claims in *Buckley*[4], Plaintiff Yordy argues that Naylor's statements "in one fell swoop" altered Plaintiffs' status, impacting the way the community viewed Plaintiffs and altering Plaintiffs' chances for successfully seeking redress for their loss under either 730 ILCS 5/5-5-6 (1992) or through a civil court. As shown, *infra*, at pp. 12-14, any rights Plaintiffs had to restitution were extinguished, not by the alleged defamation, but by Naylor's decision to dismiss criminal charges, an act for which he possesses absolute prosecutorial immunity.

For this reason, Plaintiffs' novel and imaginative theory fails to state a known and clearly established constitutional right as of September 1991. Defendant has only found one case regarding statements made to the media about the dismissal of a prosecution: *Marx v. Gumbinner*, 855 F.2d 783, 791 (11th Cir. 1988). However, *Marx* only holds that the prosecutor involved was not entitled to absolute immunity. In fact, the court even admitted that it was not determining whether the

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[4]Buckley argued that the press statements made by State's Attorney Fitzsimmons "aroused the community against him, increasing the chance that the judge would order him imprisoned pending trial and reducing the chance of acquittal at trial." *Buckley*, 20 F.3d at 798.

statements could be the basis for a constitutional violation. *Marx*, 855 F.2d at 791.[5] While courts have held that adverse pretrial statements in a criminal case can state a federal claim, Defendant has not found a case upholding a cause of action for alleged defamatory statements which could have prejudiced a later civil trial. *See Souza v. Pina*, 53 F.3d 423 (1st Cir. 1995) (prosecutor granted qualified immunity for press statement because right was not clearly established). Plaintiffs have not shown, nor can they show, that Naylor should have been aware that his statements violated Plaintiffs' constitutional rights. Moreover, Plaintiffs can claim no clearly protected "right" to restitution. First, as has been argued, *infra*, at pp. 8-9, any "right" to restitution does not vest, if at all, until such time as a criminal conviction is entered. 730 ILCS 5/5-5-6. Second, rendering an order for restitution is not mandatory, but discretionary. *Id.* For these reasons it is clear that Naylor's comments did not alter any clearly established "right" held by Plaintiffs. As a result, the most Plaintiffs lost due to Naylor's alleged defamatory remarks is a hypothetical recovery premised upon the state's ability to convict Pepple and a subsequent judicial determination to order restitution. Plaintiffs' theory is one of first impression. No case law has been cited, nor has Defendant found any, where a defamation claim combined with a possible or contingent status of this nature was found sufficient to constitute the status or right necessary to rise to the

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[5]Plaintiffs cite two other press statement cases which they argue are in direct conflict with the Seventh Circuit's decision: *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) and *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). However, both of these cases include rights, other than the defamation, which were clearly constitutionally protected under either the Fourth Amendment or state law. As shown, *infra*, at pp. 5-11, Plaintiffs herein have no similar protected interests. Further in the cases cited by Plaintiffs, the plaintiffs were not injured by the acts for which the prosecutors were entitled to absolute immunity.

level of a constitutional deprivation.

Moreover, in order to prove that Naylor is not entitled to qualified immunity, Plaintiffs must show that a "reasonable official should have known that the available state remedies were inadequate." *Polenz v. Parrott*, 883 F.2d 551, 559 (7th Cir. 1989). *See also Buckley*, 20 F.3d at 798-799 ("[q]uite apart from all questions of immunity, Buckley's claim is doomed unless he can demonstrate that Illinois failed to provide judicial procedures adequate to guard against the effects of pretrial publicity generated by the prosecutor."). Even if *Parratt* and its progeny are inapplicable to Plaintiffs' press conference claim, qualified immunity is still appropriate. Defendant has not found any court that has recognized a due process claim for press statements where the state provided comprehensive procedural safeguards and remedies in a later civil case. Moreover, the only court of appeals besides the Seventh Circuit, which has specifically addressed the contours of publicity and adequate state remedies, has implied that a *Parratt* analysis would be applicable. *Powers v. Coe*, 728 F.2d 97, 105 (2d Cir. 1984). As shown, *infra*, at page 16, given the plethora of procedural safeguards granted a civil litigant in Illinois, Plaintiffs have not and cannot challenge the adequacy of those procedures. Accordingly, Plaintiffs cannot show that Naylor should have known that these state law remedies were inadequate, and Naylor is entitled to qualified immunity.

CONCLUSION

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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